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OCT 8 1965
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NO. 567

IN THE

Supreme Court of The United States

October Term, 1965

THE GEORGE F. HAZELWOOD COMPANY,
A Maryland Corporation,
Appellant,

VS.

J. STANLEY PITSENBARGER, Assessor of
Pendleton County, West Virginia,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF APPEALS
OF THE STATE OF WEST VIRGINIA

BRIEF FOR THE APPELLEE IN OPPOSITION TO JURISDICTIONAL STATEMENT

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JURISDICTION

Appellee agrees with the facts as set forth in the second section of appellant's jurisdictional statement entitled "Jurisdiction". Appellee denies that the statute involved (Chapter 11, Article 3, Section 1,

of the Official Code of West Virginia [1931], as amended by Chapter 142 of the Acts of the West Virginia Legislature, Regular Session, 1961), presents a valid question for appeal to this Court.

Appellant contends that the action of the Pendleton County, West Virginia assessor, in assessing a tax upon a large quantity of appellant's tangible personal property having a tax situs in Pendleton County, West Virginia, on the assessment date (July 1, 1961) was in violation of the "due process" clause of the Fourteenth Amendment to the Constitution of the United States because the tax was levied for a period, and was payable at a time after appellant had removed his property from Pendleton County, West Virginia. In support of this position appellant cites five cases previously decided by this court.

Central Railroad Company of Pennsylvania v. *Pennsylvania*, 370 U.S. 607, 8 L.Ed. 2d 720, 82 S.Ct. 1297 (1962); involved the right of Pennsylvania to tax all railroad cars owned by a Pennsylvania corporation even though some railroad cars were constantly used in New Jersey and other railroad cars were used by other railroads. This Court held that since the record disclosed a certain number of railroad cars were run on fixed routes and regular schedules in New Jersey, it was possible for such railroad cars to acquire a tax situs in New Jersey, and to that extent such railroad cars could not be taxed in Pennsylvania. In so deciding the Court said:

> "Since the domiciliary State is precluded from imposing an ad valorem tax on any property to the extent that it *could* be taxed by another

> State, not merely on such property as *is* subjected to tax elsewhere, the validity of Pennsylvania's tax must be determined by considering whether the facts in the record disclose a possible tax situs in some other jurisdiction. Had the record shown that appellant's cars traveled through other States along fixed and regular routes, even if it were silent with respect to the length of time spent in each nondomiciliary State, it would doubtless follow that the States through which the regular traffic flowed could impose a property tax measured by some fair apportioning formula. Cf. Braniff Airways, Inc. v. Nebraska State Board of Equalization & Assessment, 347 US 590, 98 L ed 967, 74 S Ct 757. And this would render unconstitutional any domiciliary ad valorem tax at full value on property that could thus be taxed elsewhere. Standard Oil Co. v. Peck, supra (342 US 384)."

In the present factual situation no doubt exists that the tangible personal property of the appellant had acquired a tax situs in Pendleton County, West Virginia, which tax situs was outside the domicile of its owner on July 1, 1961, the day fixed by the West Virginia Legislature for the assessing of all property located within West Virginia. There is no question before this Court concerning the validity of a tax levied by a domiciliary State. If appellant has suffered any injustice, such injustice has been suffered at the hands of the Maryland taxing authorities and not at the hands of the West Virginia taxing authorities.

Kern-Limerick, Inc. v. *Scurlock*, 347 U.S. 110, 98 L.Ed. 546, 74 S.Ct. 403 (1954); *Esso Standard Oil Co.* v. *Evans*, 345 U.S. 495, 97 L.Ed. 1174, 73 S.Ct. 800 (1953); *United States* v. *Allegheny County*, 322 U.S.

174, 88 L.Ed. 1209, 64 S.Ct. 908; cited by the appellant, relate to the right of the State to tax the Federal Government and have absolutely no bearing on the questions being considered.

In *Standard Oil Co.* v. *Peck*, 342 U.S. 382, 96 L.Ed. 427, 72 S.Ct. 309, 26 ALR 2d 1371 (1952), the question involved the right of Ohio to tax barges owned by an Ohio corporation, but which in transporting oil along the Mississippi had little contact with Ohio. Deciding that Ohio could not tax the barges, this Court declared:

> "* * * But they have no application here since most, if not all, of the barges and boats which Ohio has taxed were almost continuously outside Ohio during the taxable year. No one vessel may have been continuously in another state during the taxable year. But we do know that most, if not all, of them were operating in other waters and therefore under Ott v. Mississippi Valley Barge Line Co. 336 US 169, 93 L ed 585, 69 S Ct 432, supra, could be taxed by the several states on an apportionment basis. The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile. See Union Refrigerator Transit Co. v. Kentucky, 199 US 194, 50 L ed 150, 26 S.Ct. 36, 4 Ann Cas 493. Otherwise there would be multiple taxation of interstate operations and the tax would have no relation to the opportunities, benefits, or protection which the taxing state gives those operations."

Again, it is clear that the facts of this case have no relation to the facts now before the Court. The appellant has failed to cite any authority that Chapter

11, Article 3, Section 1, of the Official Code of West Virginia (1931), as amended by Chapter 142 of the Acts of the West Virginia State Legislature, Regular Session, 1961, is violative of the "due process" clause of the Federal Constitution, and, therefore, on that basis appellee opposes consideration of this matter by this Court.

QUESTIONS PRESENTED

1. Does the State of West Virginia have authority to fix a date upon which all property having a tax situs within the State shall be assessed at its true and actual value, which date precedes the date of actual payment and use of the tax money so raised?

2. When tangible personal property, owned by foreign corporations, has acquired a tax situs in West Virginia, and is located in West Virginia on the date fixed by the West Virginia Legislature for the assessment of all property is removed from West Virginia prior to the period of time for which the tax is levied and paid to the domiciliary State of the property owner, is the "due process" clause of the United States Constitution violated?

STATEMENT OF FACTS

Appellee is in substantial agreement with appellant's statement of facts except in so far as such appellant states that the tax assessed on July 1, 1961, was assessed for the calendar year 1962. Doubt still exists as to whether the assessment on July 1, 1961, was for the calendar year 1962 or for the fiscal year beginning on July 1, 1962.

THE QUESTIONS ARE SUBSTANTIAL

I.

Appellant complains that because its tangible personal property was removed from Pendleton County, West Virginia, after it was legally assessed for tax purposes in West Virginia, but before the taxes were paid it has been denied "due process". Appellant, without protest or argument, paid all personal property tax which had been assessed against it on December 31, 1960. In so doing, appellant admitted that the construction equipment used in performing the construction contract had acquired a tax situs in West Virginia, and, therefore, was subject to the payment of West Virginia personal property tax.

The record reveals that the West Virginia Legislature in 1961 amended the law so as to change the assessment date for the next tax year from December 31 to July 1. In effect, the assessment date was moved back six months, or stated conversely, the assessment date is now six months earlier than before the 1961 amendment.

The following statement concerning the fixing of a date for the assessment of property taxes is found in 51 Am. Jur., Taxation, § 442:

> "While a state cannot fix a taxable situs for property which has never come into the state, and over which it has no power of control, it does have power to fix the time at which property within its jurisdiction may acquire a taxable situs. *In most jurisdictions the annual assessment of property is made as of some fixed day,*

and the situs of such property is determined as of that day, even if it has been outside the state the greater part of the year or is removed from the state before the tax is due or even has been actually assessed. This practice, while almost universal, is not based upon a constitutional right. *A state may make the ownership of property subject to taxation relate to any day or days or period of the year it may think proper.* Thus, a state may base its tax upon the average amount of property within the state owned by the taxpayer during the year. And where the taxable situs relates to a day certain in each year, no taxes can legally be assessed and levied for a particular year unless the conditions requisite to liability exist on the day fixed. In some states it is provided that property brought into the state after the day as of which the assessment is made shall be subject to taxation for the current year, and such a statute has been enforced against property brought in from another state and on which a tax had been assessed and paid for the same year. * * *" (Emphasis supplied.)

Regarding this same point, see Cooley on Taxation, Vol. 3, Fourth Edition, § 1062, wherein it is stated:

"* * * The customary regulation is that the assessment shall be made or completed on a certain day, or that it shall be made as of a certain day. This fixes the liability of persons and property to taxation for the year. There are some inconveniences and inequalities resulting from this, but some regulation of the kind is indispensable. A force of tax officers cannot be kept employed for the year in watching the transfers of property, the movements of persons,